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No. 876

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

EDNA VAN DER SCHELLING, *Petitioner*,

v.

U.S. NEWS & WORLD REPORT, INC., *Respondent*.

BRIEF OF RESPONDENT U.S NEWS & WORLD REPORT, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES H. McGLOTHLIN
701 Union Trust Building
Washington 5, D. C.
Attorney for Respondent

DAVID B. ISBELL
MICHAEL S. HORNE
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.
Of Counsel

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Respondent U.S. News & World Report, Inc., submits this brief in opposition to the petition for a writ of certiorari herein.

COUNTERSTATEMENT OF THE CASE

Petitioner brought this action in the United States District Court for the Eastern District of Pennsylvania, upon a claim that she was libeled by an article published in respondent's news magazine, *U.S. News & World Report*, which reported and accurately quoted

a speech by a United States Congressman on the floor of the House of Representatives in which the Congressman identified petitioner and others as members of "an American Communist colony in Mexico" (Joint Appendix 10a-11a).[1] The complaint invoked the jurisdiction of the court on the ground of diversity of citizenship (JA 4a), and alleged that petitioner is a "citizen of the United States and a resident of the Republic of Mexico" (JA 4a); respondent is a corporation incorporated in the State of Delaware with its principal place of business in the District of Columbia (JA 14a-15a).

In the course of pretrial discovery it was established that petitioner is a native-born United States citizen (JA 23a-24a) who has been a "permanent and continuous resident" of Mexico since 1950 (JA 22a). Under Mexican law she has the status of "inmigrada," which means a "foreigner who acquires the right of definitive residence in the country," enjoying "the permanent right to live in Mexico" and "the substantial rights of permanent residence and virtual freedom of activity or inactivity" (JA 18a, 19a). In sum, she is a United States citizen domiciled in Mexico.

After petitioner's nationality and domiciliary status were thus established, respondent moved to dismiss the action for want of jurisdiction, upon the ground that petitioner was neither a citizen of any state nor a "foreign . . . citizen or subject" within the meaning of the diversity jurisdiction statute, 28 U.S.C. § 1332(a) (1958). In opposition to the motion, petitioner contended that despite her United States citizenship,

[1] A Joint Appendix (hereinafter cited as "JA") was filed in the court below and petitioner has filed copies of this Joint Appendix with her petition to this Court.

her domicile in Mexico made her a "subject" of Mexico for purposes of the jurisdictional statute. The District Court for the Eastern District of Pennsylvania (Joseph S. Lord, III, J.), after due consideration, granted respondent's motion and dismissed the action (213 F. Supp. 756, JA 31a).

Upon petitioner's appeal, the Court of Appeals for the Third Circuit (Kalodner, Hastie and Ganey, JJ.) affirmed the decision of the District Court per curiam.

REASONS FOR DENYING THE WRIT

The decisions of the two courts below follow a long and unbroken line of decisions holding that United States citizens who are domiciled abroad, like petitioner here, cannot invoke either the diversity or the alienage[2] jurisdiction of the federal courts—and cannot have such jurisdiction invoked against them. *E.g.*, *Pemberton* v. *Colonna*, 290 F.2d 220 (3d Cir. 1961), *affirming* 189 F. Supp. 430 (E.D. Pa. 1960); *Bishop* v. *Averill*, 76 Fed. 386 (C.C. Wash. 1896); *Hammerstein* v. *Lyne*, 200 Fed. 165 (W.D. Mo. 1912); *Stein* v. *Fleischmann Co.*, 237 Fed. 679 (S.D.N.Y. 1916) (L. Hand, J.); *McClanahan* v. *Calloway*, 127 F. Supp. 929 (N.D. Calif. 1955); *Wittmeyer Trucking Co.* v. *Fess Transport Ltd.*, 191 F. Supp. 802 (W.D.N.Y. 1961); *cf.* *Stuart* v. *City of Easton*, 156 U.S. 46 (1895). The only novelty presented by this case is a semantic one: peti-

[2] Prior to the 1948 revision of the Judicial Code, the provision for suits between citizens of different states was commonly called "diversity" jurisdiction, and the provision for suits involving foreign states, citizens or subjects, was called "alienage" jurisdiction. See 1 Moore, *Federal Practice* ¶ 0.60 [3—4] (2d ed. 1961). The 1948 revision brought these two provisions together in a single section under the title "Diversity of Citizenship." Act of June 25, 1948, ch. 85, § 1332, 62 Stat. 869, 930.

tioner has chosen to contend, not that her foreign domiciliary entitles her to sue a "citizen" of a foreign state, as was argued in most prior cases, but that rather her living abroad entitles her to sue as a foreign "subject." So far as the case reports show, this argument was last raised nearly seventy years ago, and then unsuccessfully. *Bishop* v. *Averill, supra*.[3] In this century, the argument either has not been made or else has been thought by the courts to have so little merit as not to deserve mention. Certainly it does not now warrant this Court's time and attention.

The premise of petitioner's argument is that the term "subject" has in some instances been used to refer to residence or domicile. *E.g., The Pizzaro*, 15 U.S. (2 Wheat.) 227, 245-46 (1817). The argument has a simple, fatal fault: "subject" is used in the Judicial Code to convey an entirely different meaning. The phrase "foreign states or citizens or subjects thereof" in 28 U.S.C. § 1332(a)(2), derives directly from the phrase "foreign States, Citizens or Subjects," in Article III, § 2 of the Constitution; and its meaning is, of course, controlled by its constitutional root. The district judge, whose decision the Court of Appeals found so clearly correct as not to require any elaboration, carefully examined the background and history of Article III, § 2, and determined that the word "subject" was there used to designate nationals of monarchies, as distinguished from citizens of republics such as the newly founded United States. (213 F. Supp. at

[3] Only one case has been found in which this argument was thought to have any serious plausibility. *Wildes* v. *Parker*, 3 Sumn. 502, 29 Fed. Cas. No. 17,652 (C.C. Mass. 1839). However, there the point was never decided.

760-61, JA 38a-39a).[4] Since at that time there were far more monarchies in existence than republics, the framers had to use "subject" as well as "citizen" in referring to nationals of foreign states, while the single term "citizen" sufficed to describe nationals of the United States. See *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 166 (1874).

Thus, when the framers wrote "foreign . . . Citizens or Subjects," they meant aliens. Their meaning was illustrated by the first Judiciary Act, in which the word "alien" was used in place of the phrase "Foreign . . . Citizens or Subjects." Act of September 24, 1789, § 11, 1 Stat. 73, 78. See generally Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 77-79, 91 (1923).[5] Indeed, the word "alien" still appears in a number of the current provisions of the Judicial Code, and in contexts which indicate that it is synonymous with the phrase "foreign . . . citizens or subjects." 28 U.S.C. §§ 1251(b)(3), 1350, 1391, 1442(b) and 2502. Petitioner's argument asks that she be treated as an alien under § 1332(a), and presumably it would require that she be so treated under these other provisions as well. Among the consequences of such treatment would be that peti-

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[4] The trial court quite rightly recognized that "subject" has had other meanings in other contexts (213 F. Supp. at 758, JA 33a-34a), but it is simply incorrect to say, as petitioner does, that the court thereby advanced any kind of novel theory of "nationality by occupation." (Petition, p. 6).

[5] When the Judiciary Act was revised in 1875, Congress changed the statute to copy more closely the constitutional language. Act of March 3, 1875, ch. 137, § 4, 18 Stat. 470. There is no evidence that this change in wording was intended to work any substantive change in the pre-1875 law.

tioner's right to sue her own government in the Court of Claims would, under the terms of 28 U.S.C. § 2502, depend upon Mexican law.[6] The absurdity of such results may disclose the real thrust of petitioner's position: what she really seeks is not so much to have United States citizens treated as aliens, as to break down the requirement that a United States citizen must be a citizen of a state—that is, domiciled in a state—in order to sue in diversity. *E.g., Brown* v. *Keene*, 33 U.S. (8 Pet.) 112 (1834). See generally Hart & Wechsler, *The Federal Courts and the Federal System* 898-900 (1953). Thus petitioner hopes to circumvent the decisions of this Court strictly construing diversity jurisdiction, *e.g., City of Indianapolis* v. *Chase National Bank*, 314 U.S. 63, 76-77 (1941), and provide a federal forum for a wider range of non-federal cases.

Petitioner seeks to justify her proposed expansion of federal diversity jurisdiction as a matter of policy by asserting that the present rule is unjust, because it relegates some United States citizens to state courts for non-federal cases. It may be noted that for other United States citizens living abroad, the limitations on diversity jurisdiction appear to have been more often a benefit than a burden. *E.g., Wittmeyer Trucking Co.* v. *Ecss Transport Ltd., supra*; *Hammerstein* v. *Lyne*,

[6] § 2502 reads as follows:

"§ 2502. *Aliens'* privilege to sue.

Citizens or subjects of any foreign government which accords to citizens of the United States the right to prosecute claims against their government in its courts may sue the United States in the Court of Claims if the subject matter of the suit is otherwise within such court's jurisdiction." (Emphasis added.)

supra. The more important answer to petitioner's argument is, however, that diversity jurisdiction was never intended to create a federal forum for every non-federal claim. United States citizens domiciled abroad are but one group among many who may not sue in diversity: most obvious among the other groups are those whose claims are less than $10,000, and those whose suits involve more than two parties as to whom diversity is not complete. Petitioner's policy argument for a federal forum is no more compelling than such persons could make: it is equally devoid of legal substance.

CONCLUSION

The law applied by the courts below is clear and well settled, and requires no further exposition by this Court. It is, moreover, entirely correct, and needs no reconsideration here. The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES H. MCGEOTHLIN
701 Union Trust Building
Washington 5, D. C.
Attorney for Respondent

DAVID B. ISBELL
MICHAEL S. HORNE
COVINGTON & BURLING
701 Union Trust Building
Washington 5, D. C.
Of Counsel